2001

Titanium Metals Corporation of America v. Space Metals, INC and Valley Bank and Trust Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

TITANIUM METALS CORPORATION OF AMERICA, a Delaware corporation,
Plaintiff,

vs.

SPACE METALS, INC., a corporation, and VALLEY BANK & TRUST COMPANY, a Utah corporation,
Defendants.

Case No. 13474

RESPONDENT'S BRIEF

Appeal from a Judgment of the Third Judicial District of Salt Lake County, Honorable Joseph G. Jeppson

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NATURE OF THE CASE

This is an action in contract brought by Respondent, an out-of-state seller of goods, against Appellant, Valley Bank and Trust Company, enforcing payments of amounts due and owing under Letters of Credit issued by Appellant Bank.

DISPOSITION IN THE LOWER COURT

The District Court of the Third Judicial District in and for Salt Lake County, State of Utah, tried the case without a jury and the Honorable Joseph G. Jeppson rendered a judgment in favor of the Respondent and

against the Appellant for the sum of fifty-four thousand one hundred thirty-two and 72/100 ($54,132.72) dollars and costs of Court incurred.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower Court's decision in favor of Respondent and against Appellant.

STATEMENT OF FACTS

Respondent, although not disputing the Statement of Facts as set forth in Appellant's brief, does feel that Appellant has omitted some very relevant and important facts which should be brought to the attention of this Court. Respondent further feels that Appellant has misinterpreted many of the facts contained in its Statement of Facts, and therefore is making a Statement of Facts as Respondent finds them.

Respondent, Titanium Metals Corporation of America, is engaged in the business of selling metal products to manufacturing concerns throughout the nation. Its business offices are located in New York, New York. Prior to May 25, 1968, Titanium was contacted by the Defendant, Space Metals, Inc., a Utah corporation and was asked to supply Space Metals, Inc. with substantial quantities of titanium fines for use in Space Metals' Utah operation. During the early stages of negotiation, Titanium informed Space Metals that in order for the requested sales to be made on credit, Space Metals must secure from its bank, Valley Bank & Trust Company, letters of credit, so that

Titanium would be assured of payment for any and all goods which would be sold to Space Metals.

After being approached by Space Metals with this request, the Appellant, Valley Bank & Trust Company, agreed to comply and sent to Titanium a letter of credit (Exhibit 1-P) which stated in part:

> We have approved a fifteen thousand ($15,000.00) dollar line of credit for one of our very reliable customers, Space Metals, Inc. This line is for the specific purpose of covering invoices from your company. This letter of guaranty is good until August 15, 1968.

Relying upon this letter, Titanium made numerous shipments of titanium fines to Space Metals during the period of May 28, 1968 to August 15, 1968. During this period, the sales made by Titanium to Space Metals did not exceed fifteen thousand ($15,000.00) dollars. As soon as the ordered material had been shipped from the Titanium plant, an invoice was sent directly to Valley Bank & Trust indicating the amount of titanium purchased, the purchase price, and the due date of this purchase price.

Each of the invoices which Titanium mailed to Valley Bank contained the following stamped legend in the lower left-hand corner: "Please remit to: Titanium Metals Corporation of America, P.O. Box 64049, Terminal Annex, Los Angeles, California 90054".

The Appellant, upon receipt of the invoices, utilized the following procedure in connection with each letter of credit. Upon receipt of the invoices, Valley Bank would

immediately prepare an advice, each of which contained a description of the invoice and specifically identified it as a "sales draft" or "draft". This identification was typed directly on the face of the Bank's advice. (Exhibits 5-P to 10-P).

On the due date of the invoices, a Cashier's Check was drawn in payment thereof and the invoice was stamped "Paid" by Valley Bank & Trust. The check drawn on Valley Bank together with the stamped invoice and a pink copy of the Bank's advice with the description "We enclose in payment *our draft* (number of cashier's check)" [Emphasis added] would then be mailed by Appellant to the P. O. Box as directed by the sales draft. (Exhibit 4-P)

Space Metals, needing additional supplies of the titanium fines, induced Valley Bank & Trust Company, through its assistant vice-president, to send another letter of credit dated October 8, 1968 to Titanium (Exhibit 2-P) which stated in part:

> We have agreed with Mr. Williams of Space Metals, Inc. to pay all of your collection drafts upon presentation or due date until December 31, 1968.

Again Titanium continued to make shipments of the metallic material to Space Metals and as each shipment was made, sales drafts representing the shipment of titanium fines were sent to Valley Bank & Trust Company. Within the due date specified upon each sales draft Titanium would again receive a cashier's check from Valley Bank & Trust for the amount of the sales draft together with the pink copy of the Bank's advice and the invoice

stamped "Paid". The cost of the titanium fines purchased during this period was nineteen thousand ($19,000.00) dollars.

Finally on March 3, 1969, Titanium received a third and final letter of credit (Exhibit 3-P) from Valley Bank & Trust Company which bore a striking resemblance to the second letter of credit sent by Valley Bank & Trust Company. This third letter stated in part:

> We have agreed with Mr. Williams of Space Metals, Inc. to pay all of your collection drafts upon presentation or due dates for a period of ninety days from the date of this letter.

Titanium continued its normal practice of making shipments to Space Metals without objection by Appellant, simultaneously mailing sales drafts to Valley Bank & Trust Company for payment. Titanium submitted to Valley Bank & Trust a series of seven (7) sales drafts during the period covered by the third letter of credit, summarized as follows:

SALES DRAFT (INVOICE) NO.	VALLEY BANK'S ADVICE NO.	AMOUNT	DUE DATE
69-181	1257	1,438.50	4/18/69
69-188	1260	12,261.50	4/27/69
69-199	1311	4,110.00	5/4/69
69-205	1310	9,500.00	5/11/69
69-219	1326	6,850.00	5/24/69
69-223	1325	6,850.00	5/27/69
69-234	1324	4,110.00	6/1/69

(Exhibits 4-P through 10-P

Of the above sales drafts, Valley Bank sent a cashier's check for one thousand four hundred thirty-eight and 50/100 ($1,438.50) dollars accompanied by the first ad-

vice (1257) to Titanium which bore the following notation thereon: "We enclose in payment our draft — CC006923" and the invoice stamped "Paid". (Exhibit 4-P) No notice of nonacceptance, dishonor, or nonpayment of the other six sales drafts was sent by Valley Bank to Titanium on or before the due dates, but the remaining six advices were finally returned on November 19, 1969 to Titanium attached to the sales draft originally sent with the notation: "We are returning herewith unpaid — 11/19/69."

During the entire period covered by the letters of credit, the Appellant, pursuant to an agreement with Space Metals, and after being notified by receipt of Respondent's sales draft that a shipment of titanium fines had been made, had perfected its security interest in all of the fines shipped to Space Metals.

The Trial Court in Paragraph 6 of its Findings of Fact concluded that the invoices sent to Valley Bank by Titanium satisfied the requirements of the letters of credit in that Valley Bank waived its requirement for a separate draft to be attached to the invoice,

> . . . by its failure to specifically require a draft to be sent in the usual form, by issuing and forwarding its drafts purchased by Space Metals, Inc. totaling more than $19,000.00 on a similar letter of credit covering an earlier period, by its acknowledgement on the advice that the invoice copies with demand to remit payment to the sender were "sales drafts", by its failure to return the invoice copies upon receipt, or to notify it would not pay unless drafts suitable for its banking purposes accompanied the invoices, and by its retention of

the invoices after the due dates and its failure to give notice of nonpayment until more than five months after the due date. (R-115)

At no time did Valley Bank & Trust Company notify Titanium that the procedure which it was utilizing in the sending of invoices to Valley Bank was improper and that such procedure should be remedied or altered to conform to a different banking procedure and particularly that formal commercial drafts should be presented in order to collect for the shipments. In fact, an officer of Valley Bank & Trust on examination by Judge Jeppson, admitted that there was absolutely no difference in the way the Bank handled an invoice as opposed to a draft.

BY THE COURT:

Q. Mr. Anderson, you have specified your duty at the bank where they received an invoice or a draft on these letters one and two. What is the difference in how you would handle those whether it was a draft or an invoice?

A. Actually, they were handled in the same manner. There's no difference.

Q. You contacted the customer and told him you had it?

A. Right, as a courtesy we handled them in either instance.

Q. Did you ever write a letter to Titanium Metals and advise them that their invoice had been received, but since it wasn't a draft you would see if your customer wanted to instruct you on what to do with it, or something like that.

A. No sir.

Q. You didn't ever point out to them the difference.

A. No sir.

Q. In the two that you say exist now?

A. They are a large company and they have been operating under the premise of sending invoices in, and as I understand, there was no change on their part. However, on Griff's part, he was contemplating a larger letter of credit and this type of thing and he was trying to determine ways of raising capital for growth of his company.

Q. But how did you let this company know, the Titanium Company, that your procedure was going to be different, that they had to send in an invoice if you were to be liable, I mean a draft?

A. They didn't communicate with us and we didn't communicate with them because as far as our customer and us we had not resolved anything so there was no difference. (R 178 & R 179)

ARGUMENT

POINT I

WAIVER, IN THE INSTANT ACTION, NEED NOT BE SPECIFICALLY PLEAD AND THE TRIAL COURT WAS CORRECT IN FINDING THAT APPELLANT WAIVED STRICT COMPLIANCE WITH THE TERMS OF THE LETTER OF CREDIT.

Appellant has incorrectly taken the position that it was Plaintiff's obligation to specifically plead waiver at the Trial Court level in order to sustain the findings of the Trial Court both as a matter of fact and as a matter of law that the Appellant waived strict compliance with

the terms of the letter of credit. In support of this position, Appellant relies on Rule 8C of *The Utah Rules of Civil Procedure* entitled "Affirmative Defenses". This rule states in part that:

> In pleading to a *preceeding pleading,* a party shall set forth affirmatively . . . waiver, and any other matter constituting an avoidance or *affirmative defense. Id.* [Emphasis added]

It is entirely inappropriate for Appellant to rely upon this Rule inasmuch as one of the requirements in order for the Rule to apply is that there must be a "pleading to a preceeding pleading". This is certainly not the case in the instant action inasmuch as Respondent (Plaintiff), was the party who instituted the action and had no obligation whatsoever to plead to a preceding pleading. The Rule is specifically limited to situations involving the pleading of waiver as an affirmative defense. Waiver in this action is not an affirmative defense but rather merely a part of Plaintiff's initial cause of action against the Defendant.

For purposes of clarification it should also be brought to the Court's attention that the word "avoidance" carries with it substantially the same meaning as "affirmative defense". In *Mahaiwe Bank v. Douglass,* 31 Conn. 175, the word, "avoidance" was defined as the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleadings shows cause why they should not have their ordinary legal affect. It is apparent that the terms "affirmative defense" and "avoidance" are synonymous and in no

way change application of Rule 8C to situations other than those situations which involve the pleading of affirmative defenses.

Appellant cites two cases in support of its position that Respondent was required to plead waiver in order to prevail in a trial on the merits. The cases upon which Appellant relies are not applicable to the issue in question inasmuch as both *Commercial Standard Ins. Co. v. Remay,* 58 Idaho 302, 72 P.2d 859 (1937) and *Rudd v. Rogerson,* 424 P.2d 776 (Colo. 1967) are cases which involve an interpretation of Rule 8C as it applies to the pleading of waiver as an affirmative defense.

> The record in this case shows that although neither waiver nor estoppel was pleaded by Respondent (Defendant), he relied on both as defenses to the charge that he was in default in his payments and that he had removed the automobile from California without written consent. These are special defenses and evidence thereof is inadmissable under a general denial. *Commercial Standard Ins. Co., supra,* at 862.

As can be easily seen these cases do not fit the facts of the instant case. The cases which have ruled on the issue of waiver have concluded that there is no obligation upon the part of the Plaintiff to specifically plead waiver in order to prevail in a trial on the merits. In the case of *West v. Norwich Union Fire Ins. Society,* 10 Utah 442, 37 P. 685 (1894) the Plaintiff owned certain property which was destroyed by fire and an action was brought to recover the value of the property destroyed under an insurance policy issued thereon by the Defendant. In

deciding the question as to whether or not evidence related to waiver should have been admitted, the Court stated:

> Where a pleading contains an allegation of the performance of a condition, it is not absolutely necessary to allege a waiver, because proof thereof is admissable under the general allegation. 2 May, Ins. §589; *Insurance Company v. Dougherty,* 102 Pa. St. 568. *Id.* at 687.

Similarly, Respondent's pleadings contain general allegations regarding the contractual obligations arising under the Appellant's letters of credit. Respondent further alleged that it fulfilled the condition imposed upon it to ship goods and that the Appellant failed to fulfill the condition imposed upon it to pay for such goods after they had been shipped. Quite clearly then Respondent too alleged the performance of conditions in its pleading thereby eliminating any need to specifically allege waiver.

Cases in other jurisdictions have also reached similar conclusions with regard to the issue of whether or not a Plaintiff has an obligation to specifically plead waiver. In *Pfaffengut v. Export Ins. Co. of New York et al.* 212 N.W. 518 (N.D. 1927), an action involving two cases, one brought by the Plaintiff to recover on an automobile insurance policy, and the other to determine the rights of the Defendants in and to a certain draft issued to the Plaintiff by one of the Defendants in settlement of Plaintiff's claim for loss, the Court concluded that the Plaintiff had no obligation to raise the question of waiver and stated:

> This brings us to the question of waiver. Defendant first urges that it has pleaded an avoidance of the policy in its answers; that Plaintiff failed to reply setting up waiver on the part of the Defendant; and so cannot now rely upon waiver. Under the circumstances, waiver was not required to be pleaded. (Citations). *Id.* at 520

On the basis of this case the Appellant is incorrect in contending that there was a requirement for Respondent to plead waiver before Appellant could be held liable under the terms of its letter of credit.

Appellant is also in error in contending that waiver was not plead and therefore the pleadings did not conform to the proof offered. The Utah Supreme Court is in accord with Respondent's position that where a party raises an objection that there is a fatal variance between the pleadings and the proof, such objection cannot be taken for the first time on appeal. This was the holding in the case of *Mumford v. Hartford Accident and Indemnity Co.,* 64 Utah 24, 40, 228 P. 206 (1924). In this case the Plaintiff sued Defendant for damages on an indemnity bond in which the Union Livestock Commission Company of Ogden, Utah was principal and the Defendant therein was surety. Plaintiff's Complaint alleged that the drafts were drawn on the Livestock Company with its knowledge and the Court found that such drafts were drawn with the knowledge "and consent" of the Livestock Company. The Utah Supreme Court held that the variance between the pleadings and the proof did not justify a reversal.

> We have already arrived at a conclusion that the facts found by the Court are sustained by the evidence, and while we do not conceed that there is a

> material variance in view of authorities heretofore referred to, yet, even if the Complaint were defective in the respect mentioned, there being no objection in the Court below, the defect in this Court should be held immaterial and be disregarded. (Citation) *Id.* at 212.

Respondent, in its Motion for New Trial (R-107) made no mention that counsel was taken by surprise in that waiver had not been plead, nor was the argument even advanced that no opportunity was given to dispute the facts proving waiver until the time that this appeal was taken.

From all of the above authorities and holdings it is extremely clear that waiver in the instant action need not be specifically plead by Respondent and that the Trial Court was correct in finding that Appellant waived strict compliance with the terms of the letter of credit in issue, such finding being based entirely based entirely on the evidence presented at trial in support of Respondent's position that Appellant was liable under the terms of Appellant's letter of credit.

POINT II

THE EVIDENCE PRESENTED TO THE TRIAL COURT CLEARLY SUPPORTS ITS FINDINGS THAT STRICT COMPLIANCE WITH THE TERMS OF THE LETTER OF CREDIT WAS WAIVED BY APPELLANT.

Appellant maintains that there was no evidence presented to the trial court to support a finding of waiver. Nothing could be further from the truth. The record is

replete with statements by bank officials which clearly support the lower court's finding that the Bank did in fact waive strict compliance with the terms of its letter of credit in issue.

Appellant cites in its brief the case of *Phoenix Ins. Company v. Heath et al.,* 90 Utah 87, 61 P.2d 308 (1936). This case involved a Plaintiff insurance company who had instructed its agents, later to be named Defendants, to reduce the amount of an insurance policy which Plaintiff had issued upon a certain building. Upon receipt of this *definite* instruction to cancel promptly, the Defendant agents wrote to the Plaintiff insurance company and asked it to reconsider the reduction. The Plaintiff immediately responded by letter and affirmed its original directive. Just prior to the time that Plaintiff's letter was received by Defendants, the insured building was destroyed. The Plaintiff's insurance company sued the Defendants for the difference between the amount it was required to pay to the insured and the amount it would have been required to pay had the Defendants followed the directives contained in Plaintiff's letters. The Defendants contended that Plaintiff's action constituted a waiver of its demand to reduce the policy. The Court found in this case that no waiver was proven because there was no proof offered to show that it was Plaintiff's intention to reconsider their original order. The Court in finding for the Plaintiff found, 1) that the agents did not promptly request reconsideration; 2) that the company did not reconsider or reexamine the matter; 3) that the company did not delay in making its reply to the agents and 4) that the company immediately reaffirmed its request for cancellation.

The facts of the above case upon which Appellant heavily relies, are very different from the facts of the case involving Valley Bank & Trust. Moreover, Appellant has omitted an important part of the definition which is extremely relevant to the issue of whether or not sufficient evidence was presented to support a finding of waiver. What the Court in fact stated was:

> A waiver is the intentional relinquishment of a known right. (Citation) To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, *although it may be express or implied.* (Citations) *Id.* at 312. [Emphasis added]

It should be noted that the Court in this case not only defines waiver but also states that waiver may be express, or implied from the conduct of the party against whom a waiver is being asserted. The instant action involves three (3) letters of credit and a failure to pay or honor obligations under the third and final letter of credit by the Appellant. The period of time covered by these three letters of credit ran from May 28, 1968 to June of 1969, a period of more than one full year during which time Respondent continuously relied upon Appellant's guarantee of the credit of Space Metals. During that lengthy period of time, Defendant Valley Bank & Trust took no affirmative action whatsoever to inform Respondent that *any* of the procedures being utilized was incorrect. There is a total absence of any statement in the record made by any bank official indicating that the bank intended a change of procedure on the part of Titanium, its agents and/or representatives.

In *Phoenix supra,* the insurance company attempted immediate action to definitely define its position and inform its agents that it did in fact require compliance with its original directive. In the instant case, Valley Bank & Trust never, during the entire period in question, defined its position, expressed any discontent over the procedure which was being used by Titanium in informing Valley Bank & Trust of the amounts due and owing by Space Metals and never requested Titanium to conduct itself differently.

Respondent does not disagree with the statement of the law in *Phoenix* but Respondent does definitely wish to bring to the Court's attention that the facts in Phoenix are so different from the facts of the case in question that this case only gives the Court an indication as to what activity does not amount to a waiver.

> A waiver may be express or implied, it may be established by an express statement or agreement, *or by acts or conduct from which an intention to waive may reasonably be inferred . . .* An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive a right or where his conduct is inconsistent with any other intention than to waive it. Waiver may be inferred from conduct or acts putting one off his gard and leading him to believe that a right has been waived. 28 Am. Jur. 2d *Estoppel and Waiver* §160. [Emphasis added]

In the case of *Reynolds v. Travelers Ins. Co.,* 176 Wash. 36, 28 P.2d 310, 314 (1934) an action was brought to recover the full amount of a life insurance policy made payable at the death of the insured name therein. The

Court, in concluding that the Appellant insurance company had waived strict compliance with the terms of the policy regarding notice, treated the question of "implied waiver" by stating that:

> An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right or where his conduct is inconsistent with any other intention than to waive it . . . A waiver is unilateral and arises by the intentional relinquishment of a right, or *by neglect to insist upon it* ..... (Citations) *Id.* at 314 [Emphasis added]

Clearly, in the present case, the trial court looked at the conduct of the Appellant as evidenced by the record and determined that the evidence with which it was presented was sufficient to support both a finding of fact and a conclusion of law that Appellant Bank, Valley Bank & Trust had waived strict compliance with the terms of its letter of credit.

In the Findings of Fact, Paragraph 6, the Court did not generalize but specifically enumerated the acts of Valley Bank's offices which supported the general findings and the conclusions of law. These specifics are supported in the record by the following testimony. The trial court specifically found that Appellant had waived the necessity for a separate draft by "its failure to specifically require drafts to be sent in the usual form". (R 170 & R 171)

The bank officer further testified that at no time was Titanium ever advised that the procedure which it was

following was incorrect or not in accord with the normal banking procedures utilized by Valley Bank & Trust. (R 178 & R 179)

The Court further concluded that Valley Bank had waived strict compliance by "issuing and forwarding *its drafts* purchased by Space Metals totaling more than $19,000.00 on a similar letter of credit covering an earlier period, as evidenced by the first invoice shipment covered by the letter of credit". (R. 144) [Emphasis added]

Similarly the Court also concluded that Valley Bank waived strict compliance "by its acknowledgement on the advice that the invoice copies with the demand to remit payment to the center were 'sales drafs' ". (R 142) In further support of this finding, the record contains testimony from an officer of Appellant Bank that the Bank identified the invoice as a sales draft. (R170, 171, 172, 139 & 140)

And finally the trial court concluded that Appellant had waived strict compliance by its failure to return the invoice copies upon receipt or to notify it would not pay unless drafts suitable for its banking purposes accompanied the invoices and by its retention of the invoices after the due dates and its failure to give notice of nonpayment until more than five months after the due date. (R142, 193 & 194)

The record clearly shows that there was more than substantial evidence upon which the trial court relied in entering its finding that Appellant had waived strict com-

pliance with the terms of the leter of credit. The conduct entered into by Appellant amounted to an implied waiver as defined in *Reynolds, supra.* Respondent relied on the conduct of Appellant and Appellant must be held responsible for its failure to insist upon strict compliance with the terms of its letter of credit, and by reason of such conduct has waived any separate right to be relieved of liability because separate formal commercial drafts were not sent separately with the sales invoices.

POINT III

THE ISSUER OF A LETTER OF CREDIT MAY WAIVE STRICT COMPLIANCE WITH THE TERMS THEREOF AND IS THEREBY ESTOPPED FROM LATER CLAIMING EXEMPTION FROM LIABILITY.

Article Five of *The Uniform Commercial Code* entitled "Letters of Credit", has been adopted in Utah and is found in §70A-5-101 *et seq.* of the *Utah Code Ann.* (1953). These statutes should be utilized by the Court in assessing the merits of Defendant's appeal, and Respondent would particularly like to call the Court's attention to the basic definitional sections of that chapter and also to the official comments made on those particular sections by the drafters of *The Uniform Commercial Code.*

Section 70A-5-102 states that:

> (1) This chapter applies
>
> (a) to a credit issued by a bank if the credit requires a documentary draft or a documentary demand for payment; and . . .

> (c) to a credit issued by a bank or other person if the credit is not within subparagraphs (a) or (b) but conspicuously states that it is a letter of credit or is conspicuously so entitled . . .
>
> (3) This article deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to this act or may hereafter develop. The fact that this chapter states a rule does not by itself require, imply or negate application of the same or a converse rule to the situation not provided for or to a person not specified by this article. *Id.*

The official comments to paragraph (1) (a) particularly state that:

> Paragraph (1) (a) is applicable to banks and states whenever the promise to honor is conditioned on presentation of any piece of paper, the transaction is within this article . . . *Id.*

In commenting on subsection (3), the drafters of the law realized that the concept of letters of credit is still growing and in many instances unexplored. It was their intention to leave the application of Chapter Five dealing with letters of credit very broad in scope and allow the Courts to look into the facts surrounding each individual transaction and then apply the law in existence at the time of is decision.

> Subsection (3) recognizes that in the present state of the law and variety of practices as to letters of credit, no statute can effectively or wisely codify all the possible letters of credit without stiltifying further development of this useful financing device. The more important areas not covered by this article revolve around the question of when docu-

ments in fact and in law do or do not comply with the terms of the credit. In addition, such minor matters as the absence of expiration dates and the effect of extending shipment but not expiration dates are also left untouched for future adjudication. The rules embodied in this article can be viewed as those expressing the fundamental theories underlying letters of credit. For this reason, the second sentence of subsection (3) makes explicit the Court's power to apply a particular rule by analogy in cases not within its terms, or to refrain from doing so. *Under §1-102 such application is to follow the cannon of liberal interpretation to promote underlying purposes and policies.* Since the law of letters of credit is still developing, conscious use of that cannon and attention to fundamental theory by the Court are particularly appropriate. *Id.* [Emphasis added]

In defining a letter of credit, section 70A-5-103 *Utah Code Ann.* (1953) states that:

> (1) In this article unless the context otherwise requires,
>
> > (a) "credit" or "letter of credit" means an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this article (§5-102) that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. A credit may be either revokable or irrevokable. The engagement may be either an agreement to honor or a statement that the bank or other person is authorized to honor.
> >
> > (b) A "documentary draft" or a "documentary demand for payment" is one honor of which is conditioned upon the presentation of a document or documents. "Document"

> means *any paper including* document of title, security, *invoice,* certificate, notice of default and the like . . . *Id.* [Emphasis added]

As can be easily seen from the above-cited statutes it was the intention of the framers of the law to draft a statute involving letters of credit which would be broad enough to encompass the developing commercial concepts to which letters of credit are applicable. In order to do this, the statutory language was intentionally kept extremely broad and the Courts were assigned the task of interpreting such, and were given great discretionary power to determine whether or not the transaction fell within the terms of Chapter Five of the *Uniform Commercial Code.* The only caveat or restriction placed upon the interpreting Court is that its decisions should be in accord with the fundamental theory and underlying purposes and policies of the *Uniform Commercial Code,* namely, promotion of easy, uncomplicated, and economically beneficial commercial transactions.

With the above statutory directives kept in mind, this Court must decide whether or not Appellant did, in fact, through its normal banking procedures, waive strict compliance with the terms of its letters of credit issued on March 3, 1969. Respondent would refer the Court to the case of *Consolidated Sales Co., Inc. v. Bank of Hampton Roads,* 193 Va. 307. 68 S.E.2d 652 (1952), a case which is almost an exact duplicate of the case at bar. In this action, the Consolidated Sales Company, Inc. sued the Bank of Hampton Roads to recover the amount for which Defendant sold certain electrical appliances to a retail

dealer on Defendant's credit. Recovery of the sums sued for was denied by the trial court and Plaintiff appealed.

From the facts of the case it was found, that the Defendant bank had issued to the Plaintiff a letter of credit guaranteeing the payment for goods purchased on open account by one of the bank's customers. Upon the submission by the Plaintiff to the bank of drafts accompanied by invoices representing the goods which should be shipped, the bank promised remittance upon receipt of that documentation.

Plaintiff began to make sales to the bank's customer and attached the requested draft to each of the first seven (7) invoices submitted to the bank for payment. Thereafter, an additional eighteen to twenty shipments were made by the Plaintiff and the Plaintiff received payment for such by the bank upon the mere submission of invoices alone. In treating the question of waiver by the bank of strict compliance, the Court agreed with the trial court which had held that the Bank, by its conduct had waived strict compliance with the terms of the letters of credit.

> It definitely appears that on all of the numerous shipments made subsequent to the first seven, no draft was sent with the invoices. The trial court held that by continuing to make payment upon receipt of the invoices alone, *the bank had waived the provision in the letter which specified and had theretofore required that a draft accompany each invoice.* With that conclusion we agree. *Id.* at 656 [Emphasis added]

The record is filled with references made by bank officers to the fact that the bank itself had on each occasion

typed an advice which described the invoice as a draft. If this alone is not sufficient to sustain the finding of the trial court, then the Court's decision in *Consolidated Sales Company, supra,* should be. Appellant had, for the period of over one year, induced Respondent, by its letters of credit, to make shipments to Space Metals, Inc. On all occasions, Respondent submitted to Appellant invoices which were described by Appellant itself as "sales drafts". Appellant even went so far as to pay the first sales draft which it received under the third letter of credit. (Exhibit 4-P) As set out in the Statement of Facts, Appellant then belatedly returned the remaining six sales drafts (invoices) unpaid.

The question of the necessity of an accompanying draft was also treated in the case of *Richard v. Royal Bank of Canada,* 23 F.2d 430 (2d Cir. 1928). In this case, the Plaintiffs agreed to pay the bank, the issuer of the letters of credit, any amounts that they had paid out, if payments were made under the conditions embodied in the letters of credit, and, if the conditions had been strictly adhered to. The letters of credit provided that the shipments must be completed and the drafts drawn on certain dates. The drafts were to be accompanied by certain documents. The bank, upon receipt of the documents, made payments although no drafts were presented to Plaintiff. Judge Agustus N. Hand affirmed the trial court's decision and stated that:

> The letters of credit did not require the drawing of drafts. They assumed that they would be drawn, but, had they been drawn by a seller of iron, the Defendants, who were financing Fogle in his purchases, could not have sued the drawers thereof.

> To be sure, the drafts would have served as vouchers, but the receipts furnished were as good. Likewise, as the weight certificates, the weight is given on the invoices, and approved by the person designated to approve the weight certificates. No possible purpose could be served by having separate documents, although such appeared to be more customary. *Id.* at 433.

It is clear from the above-cited authorities that Appellant, by reason of its very definite conduct, had voluntarily changed its position and had waived any requirement of strict compliance under the terms of its letter of credit. In so doing, the Appellant cannot now come to this Court and assert that it had been wronged by reason of Respondent's alleged failure to comply with banking procedures which Appellant, for over a period of one year, never felt important enough to enforce or even discuss with Respondent. *Consolidated Sales Co., supra,* and *Richards, supra,* both stand for the proposition that technical objections raised by the issuer of a letter of credit will not be sufficient to justify a conclusion that the issuer should not be held responsible for payments guaranteed by reason of its own letters of credit.

POINT IV

A LETTER OF CREDIT SHALL BE CONSTRUED IN A LIGHT MOST FAVORABLE TO THE RECIPIENT THEREOF AND IN CASES OF AMBIGUITY THE AMBIGUITY SHALL BE RESOLVED IN FAVOR OF THE RECIPIENT.

It has been consistently the practice of the courts, when faced with the interpretation of a letter of credit,

to interpret such letter in a light most favorable to the recipient. In the case of *Venizelos, S.A. v. Chase Manhattan Bank,* 425 F.2d 461 (2d Cir. 1917) the trial court granted a Motion for Summary Judgment on behalf of the confirming bank and denied a similar motion made by the beneficiary of a letter of credit. In finding that the beneficiary had in fact complied with the terms of the letter of credit, the Court gave a concise and accurate summary of the principles of interpretation that should be utilized when attempting to construe a letter of credit.

> A construction that will sustain an instrument will be preferred to one that will defeat it; (Citations) If an agreement is fairly capable of a construction that will make it valid and enforceable, that construction will be given it. (Citations) The same general principles which apply to other contracts in writing govern letters of credit. (Citations) Where a letter of credit is fairly susceptible of two constructions, one of which makes it fair, customary, and one which prudent men would naturally enter into, while the other makes it inequitable, the former interpretation must be preferred to the latter, and a construction rendering the contract possible of performance will be preferred to one which renders its performance impossible or meaningless. (Citations) Moreover, as between the beneficiary of the letter of credit and the issuer, if ambiguity exists, the words are taken as strongly against the issuer as a reasonable pleading will justify. *Id.* at 465, 466.

Clearly then in the instant case, even if Appellant were to assert ambiguity or error in the letter of credit, this Court should construe that letter of credit in favor of the beneficiary as opposed to the issuer so that the

basic commercial principles underlying letters of credit will not be disrupted.

A similar result was reached in the case of *Bank of America National Trust and Savings Assn. v. Liberty Bank & Trust,* 116 F.Supp. 233 (D.C. Okla. 1953). In establishing rules of interpretation and construction for letters of credit the Court stated:

> Although there is a line of authority which could be interpreted to require that each "t" be crossed and "i" be dotted by any and all banks dealing with letters of credit and drafts negotiated thereunder, such an interpretation of this line of authority is improper. Certain practical considerations must be taken into account in determining whether the terms of the letter of credit have in fact been met.
>
> This Court frowns upon mere technical defenses where in essence the contractual understanding between the parties has been met. *Id.* at 236.

Michie on Banks and Banking, Vol. p. 372, is in agreement with the holding in both *Venizelos S.A., supra,* and *Bank of America, supra.*

> In determining the conditions of a bill of credit, the ordinary rules governing this construction and interpretation of writings, and especially commercial contracts are applied. This is a construction of a letter of credit as to the conditions precedent to payment of drafts is governed by rules applicable in ordinary commercial contracts. *Accordingly, the bank's writings respecting a letter of credit must be construed most strongly against it, and must be construed so as to be reasonable and consistent with an honest intent.* . . . letters of credit do not usually contain a direct promise to

> pay; but such promise is implied or inferred from the statement that the credit has been established and is irrevokable. *Id.* [Emphasis added]

As is clearly pointed out from the above authorities, even if it were to be conceeded, that there was an ambiguity in, or failure to comply with, the letter of credit in issue, that ambiguity, and/or noncompliance must necessarily be construed in favor of the Respondent. To do otherwise would have the untenable effect of unnecessarily and improperly restricting common commercial practices and would cause many out-of-state extenders of credit to refrain from extending such credit because of fear that an accidental failure to comply with one of the mere technicalities of the letter of credit would result in the issuer's escaping liability and thereby place the entire financial burden and loss upon the out-of-state extender of credit. Such a result is not only undesirable but highly improper.

It is Appellant's contention that there was not strict compliance with the terms of the letters of credit. Respondent, while rebutting the arguments raised by Appellant, has demonstrated that there was in fact strict compliance with the terms of the letters of credit, based upon the Appellant's employee's own admissions that the documents which were received under terms of the letter of credit were considered as and identified by the bank's employees as "sales drafts" or "drafts" and were paid as such without objection by the bank. The record makes it perfectly clear that Appellant and Respondent, by reason of their continuous and unchanged course of conduct, had agreed and consented to the procedure that the in-

voices which Respondent submitted were sufficient to qualify as drafts under each of Appellant's letters of credit. The testimony given to the trial court and the exhibits offered and received support the conclusion that the parties had agreed to a course of conduct which the Appellant now asserts was improper. Appellant should not be allowed to alter the terms of an agreement which it voluntarily entered into and which later proved not to be in its best economic interests. Therefore, Appellant's argument in Point III of its brief regarding strict construction of letters of credit is moot, such mootness arising by reason of Appellant's own admission and own practices which necessarily qualify the invoices (sales drafts) as drafts under the terms of its letters of credit. Appellant, by and through its officers, admitted in the record that the bank's procedure in handling invoices and drafts was entirely the same in that the bank, upon receipt of invoices, processed such just as it would process a draft which had been received. The Appellant should not be allowed to escape liability by raising a technicality and particularly one which had never been brought to Respondent's attention during the entire period of Respondent's relationship with Appellant.

POINT V

THERE IS A PRESUMPTION THAT THE JUDGMENT OF THE TRIAL COURT WAS CORRECT AND EVERY REASONABLE INTENDANT MUST BE INDULGED IN FAVOR OF IT.

The trial court in its Findings of Fact concluded that the Appellant had, by its actions for over a period of one

year, waived strict compliance with the terms of the letters of credit which it had isued. Appellant now asks this Court to review the findings of the trial court and claims those findings to be in error. It has consistently been the practice of the Utah Supreme Court to review with careful scrutiny the claim by any Appellant that the trial court's decision was in error.

In the case of *McCollum v. Clothier,* 121 Utah 311, 241 P.2d 468 (1952) the Plaintiff brought an action against the Defendant to recover under implied contract for services rendered and expenses incurred by the Plaintiff in securing bidders on and buyers of machinery and equipment sold for the benefit of Defendant at a sheriff's sale. The Supreme Court held that the evidence was sufficient to support the findings and that there was an implied contract to pay for reasonable value of Plaintiff's services. In affirming the judgment of the trial court, the Court stated that:

> The Plaintiff having prevailed, is entitled to the benefit of the evidence viewed in the light most favorable to him, together with every inference and intendment fairly and reasonably arising therefrom. *Id.* at 469.

The case of *Buckley v. Cox,* 122 Utah 151, 247 P.2d 277 (1952), summarizes the test followed by the Court:

> Hence, if there is any competent evidence in the record to support the Court's findings the judgment should not be disturbed. (Citations) This principle is well stated in *Jensen v. Gerrard,* 85 Utah 481, 39 P.2d 1070, 1072:
>
> > As this is a law action, the question is not whether the evidence would have sup-

> ported the decision in favor of Appellants, but whether the decision made by the trial court finds support in the evidence. If there is competent, credible evidence to support the findings made by the trial court, then those findings should stand. *Id.* at 279.

A careful review of the record before this Court reveals a substantial amount of evidence in support of the trial court's decision. It is the Appellant's burden to show that the judgment of the trial court was incorrect and the Appellant must overcome a presumption that the judgment of the trial court was correct and the burden of affirmatively showing error is on the party complaining thereof. (See ***Burton v. Zions Cooperative Mercantile Institution,*** 122 Utah 360, 249 P.2d 514 (1952).

Appellant has not met this burden; it has only made broad, all encompassing statements claiming that the evidence presented to the trial court did not support the trial court's findings and then arguing the trial court incorrectly aplied the law to the facts.

POINT VI

THE TRIAL COURT'S USE OF THE WORD "WAIVER" TO DESCRIBE APPELLANT'S CONDUCT WAS CORRECT AND APPELLANT HAD AN OPPORTUNITY TO REBUT ALL OF SUCH EVIDENCE OF CONDUCT AT THE TIME OF TRIAL.

In response to Appellant's argument that the Court erred in considering and deciding the case on a theory which was not plead nor revealed to the parties until

after the conclusion of the trial, it has been shown that Respondent, in fact, had no duty to plead waiver as Appellant has claimed. Appellant is further incorrect in his statement that there was no evidence offered on waiver. The record is filled with evidence that Appellant's conduct as it applied to each of the letters of credit which it had issued. It becomes quite clear upon a reading of the record including the Findings of Fact and Conclusions of Law that the trial court used the term "waiver" to describe the sum total of Appellant's conduct which justified the attaching of liability to Appellant. The issue of waiver was also raised in Respondent's trial memorandum which was submitted to the Court. Appellant, at this time, had an opportunity to submit a reply memorandum to rebut Respondent's argument that Valley Bank & Trust was liable under its letter of credit. Appellant had every opportunity to submit evidence which would show that it did in fact require strict compliance. Either that evidence does not in fact exist or if it does, Appellant failed to introduce it at the time of trial. Respondent, on the other hand, as the record will reveal showed through the testimony of bank officials that Appellant did not require strict compliance with the terms of the letter of credit.

For purposes of argument, even if it is assumed that the trial court was in error in not informing the parties that it would be relying on the theory of waiver to decide the case, Appellant's argument is still doomed to failure. In the case of *Tree v. White, et al,* 110 Utah 233, 171 P.2d 398 (1946), the Utah Supreme Court sets out to test as to what would amount to a reversable error.

> We direct our attention to the cross assignments of error urged by plaintiff, for the reason that if the trial court made erroneous findings we will not reverse the judgment if the findings which should have been made would support the judgment entered.
>
> > A decision right in result will not be reversed even though the reason stated for it is wrong. (Citations)
>
> The Appellant may not prevail unless there has been an error in the result as well as error in the reasoning. *Dayton Power & Light Company v. Public Utilities Comm.,* 292 U.S. 290, 54 S.ct. 647, 652, 78L. ed. 1267. *Id.* at 399.

Applying this test to the case at bar, it becomes clear that if we assume that the trial court based its findings on the wrong reason, i.e. "waiver", the record clearly reveals that Respondent was in fact entitled to judgment in its favor by reason of Appellant's conduct, whether that be labeled as "waiver" or an actual admission, together with the bank's advices which confirm Respondent's position that invoices were sales drafts which complied with the letter of credit.

In conclusion, for purposes of argument, it would appear that the result which the trial court reached was entirely correct and it is inconsequential whether the reasoning utilized by the trial court in reaching that result was proper or improper.

CONCLUSION

It is apparent from the authorities cited by Appellant and the facts of the instant action that the trial court was correct in entering judgment for the Plaintiff Titanium Metals Corporation. Titanium had relied upon three letters of credit issued by Respondent to insure payment for goods which Titanium sold to Space Metals. Appellant, during the entire transaction took a security interest in all of the titanium fines sold to Space Metals by Titanium to protect its interests in the transaction. Appellant's claim that Titanium should not recover because it did not follow normal banking procedures is incorrect inasmuch as Titanium followed a procedure which Valley Bank assented to and accepted without objection. Valley Bank even paid with its own drafts all invoices submitted under the first two letters of credit and the first purchase under the third letter of credit. Valley Bank cannot now assert that it is not liable to Titanium for the price of the goods purchased by Space Metals under its third letter of credit.

The authorities cited in Respondent's brief support the principle that waiver, in the instant action need not be specifically plead by Respondent. The trial court was correct in finding that Appellant waived strict compliance with the terms of the letter of credit in issue, such finding being based entirely on the evidence presented at the trial in support of Respondent's position that Appellant was liable under the terms of Appellant's letter of credit. Appellant must be held responsible for its failure to insist upon strict compliance with the terms of this letter of credit and by reason of such conduct has waived

any right to be relieved of liability because separate formal commercial drafts did not accompany the sales invoices. Technical objections raised by the issuer of the letter of credit will not be sufficient to justify a conclusion that the issuer should not be held responsible for payment guaranteed by reason of its own letters of credit, the terms of which were satisfied.

Even though it is Respondent's position that there was strict compliance with the terms of the letters of credit, as agreed upon by the parties, Appellant should still not now be allowed to recover claiming ambiguity in the terms of the third letter of credit because if in fact there was ambiguity, that ambiguity should be resolved in favor of Respondent, the beneficiary of the letter of credit.

There is also a presumption that the judgment of the trial court was correct and every reasonable intendment must be indulged in favor of it. It is the Appellant's burden to show that the judgment of the trial court was incorrect and the burden of affirmatively showing error is on the Appellant. It has not met this burden and the judgment of the trial court should be affirmed.

The trial court's use of the word "waiver" to describe Appellant's conduct was correct and Appellant had an opportunity to rebut all of such evidence of conduct at the time of trial or on motion at the conclusion of the trial. Appellant failed to do so. Even if it is assumed that the trial court based its findings on the wrong reason, the

record clearly reveals that the Respondent was in fact entitled to judgment in its favor by reason of Appellant's conduct during the period in question. A decision right in result will not be reversed.

From all of the above, we submit that the trial court was correct in finding for Respondent and its judgment should be affirmed by this Court.

Respectfully Submitted,

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